G.R. NAIR & ANOR. v. EASTERN MINING & METALS CO. SDN. BHD.

[O.C.J. (Ibrahim J.) December 9, 1973]
[Kota Bharu — Civil Suit Nos. 50 of 1970 & 14 of 1971]

Trusts — Express or constructive — Insurance policy taken out by company — Employees beneficial and equitable interest therein — whether any.

These are two consolidated suits, both plaintiffs being employees of the defendant company. The plaintiffs' claim is for benefits payable under a Group All Sickness Policy of insurance taken out by the company with an insurance company. The plaintiffs' claim is based on the contention that a trust had been created by (a) the act of the company in taking out the policy and (b) by its conduct and practice antecedent to the commencement of these proceedings.

The terms of the policy indicated quite clearly that no express trust had been created. There was no mention of a trust in the said policy and it was not stated that it was for the benefit of the employees. It was the defendant company which paid the premium and was insured thereunder and which received any sum payable by the insurance company under the said policy.

It was agreed that other disabled employees had been paid certain sum by the defendants but the defendant company had all along stressed the *ex-gratia* nature of these payments. In the case of deceased employees of the company the company had paid sums to such persons as it considered the deceased's dependants which fact itself was incompatible with the defendant company being a trustee of monies paid pursuant to the insurance policy.

Held: the defendant company had chosen to insure itself for its own purposes. There was neither an express trust nor a constructive trust in favour of the plaintiffs.

Cases referred to:-

(1) *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70 pp. 79 & 80.
(2) *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147.
(3) *In re Sinclair's Life Policy* [1938] 1 Ch. 799.
(4) *Prudential Staff Union* v. *Hall* [1947] 1 K.B. 685.
(5) *Green* v. *Russel* [1959] 2 Q.B. 256.

CIVIL SUIT.

C. Jegathesan and *A. Gomez* for the plaintiffs.

Peter Mooney for the defendants.

Ibrahim J.: In these consolidated actions paragraphs 3 and 4 of both the plaintiffs' statement of claim read as follows:—

"3. At all material times the plaintiff as an employee of the defendant company was insured under Group All Sickness Policy NM 2678 (hereinafter referred to as the policy) the insurers being London and Eastern Insurance Company Limited, 13th Floor, Jardine House, Pedder Street, G.P.O. Box 14225, Hong Kong.

4. On the plaintiff being medically boarded-out the defendant company as trustee of the plaintiff wilfully and wrongfully denied the plaintiff the benefit accruing to the plaintiff under the policy."

P1 is a photostat copy of the said Group All Sickness Policy No. NM 2678 and Mr. G. R. Nair (plaintiff in Civil Suit 50/70) and Encik Mohamed Dom bin Lassim (plaintiff in Civil Suit 14/71) claim that the benefits they are entitled to under the said policy calculated on the unit basis are $67,000 and $32,300 respectively.

Paragraphs 2 and 3 of the statement of defence in both actions read as follows: —

"2. It is admitted that the plaintiff was formerly an employee of the defendant company. It is admitted that the defendant company had an All Sickness Policy with the London and Eastern Insurance Company Limited, 13th Floor, Jardine House, Pedder Street, G.P.O. Box 14225, Hong Kong. It is denied that the plaintiff was insured by the said policy.

3. It is denied that any benefit accured to the plaintiff under the said policy on him being medically boarded out and it is denied that the defendant is the agent or trustee of the plaintiff. It is further denied that the defendant wilfully or wrongfully denied any benefit to the plaintiff."

In paragraph 4 the defendant company denies that either of the plaintiffs is entitled to the sums claimed or any sum.

It is the plaintiffs' contention that a trust has been created by (a) the act of the defendant company in taking out the said policy and (b) its conduct and practice antecedent to the commencement of these proceedings.

Prima facie, the purchaser of a policy of insurance, *i.e.* the person paying the premium is the person entitled to the equitable and beneficial interest in the policy money but the purchaser may constitute himself a trustee for some other person of his rights under the policy and thus confer on that other person a right to the insurance money enforceable in equity. (See paragraphs 1129 and 1148 of *MacGillivray On Insurance Law*, Fifth Edition, 2nd Volume). The burden of proving the trust is on the plaintiff and this must be proved by distinct evidence. As stated by Lord Wright in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*[1] at pages 79 and 80:

"The intention to constitute the trust must be affirmatively proved: the intention cannot necessarily be inferred from the mere general words of the policy."

Condition 1 of the said policy states that it shall be read together with the Schedule and though the Schedule merely mentions the estimated yearly amount of the employees' remuneration it is not disputed that the plaintiffs were among two of the employees referred thereto. It is however quite clear from the terms of the said policy that no express trust has been created in this case. There is no mention of a trust in the said policy and it is not stated that it was for the benefit of the employees. It is the defendant company which pays the premium and is insured thereunder and it is the defendant company which receives any sum payable by the insurance company under the said policy. Furthermore, if the said policy is determined it is the defendant company which is entitled to a refund of the premium and that the employee could have no claim on this. Condition 8 clearly states that the insurance company shall not be bound to recognise any equitable interest in the said policy.

Even if a policy expressly states that it is taken out for the benefit of another (which is not the case here) this does not establish a trust. This is demonstrated by the classic case of *Cleaver* v. *Mutual Reserve Fund Life Association*[2] which was a civil case arising out of the murder by Florence Maybrick of her husband who had effected a policy on his life for her behalf. The case is a leading authority on third party rights under a policy of insurance. It was held in that case that the policy money belonged to the deceased's executors and not to his wife. Lord Esher at page 151 said:

"The contract is with the husband, and with nobody else. The wife is no party to it. Apart from the statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband."

and at page 157 Fry L.J. said:

"She was, independently of the statute, a stranger to the contract; it might have been put an end to by the contracting parties without her consent, and the breach of it would have given her no cause of action against anyone."

(The statute referred to in the judgments quoted above is the English Married Women's Property Act 1882 the relevant provisions of which are similar to those in section 23 of our Civil Law Ordinance, 1956 and they have no bearing at all on our case).

Cleaver's case has been followed several times, *e.g.* in *In Re: Sinclair's Life Policy.*[3] X took out an endowment policy in his own name expressly for the benefit of his godson. It was held that this did not create a trust in favour of the godson who had no beneficial interest in the policy. In the course of his judgment Farwell J. at page 802 onwards said:

"... There is no doubt, I think, on the evidence that Mr. Sinclair was desirous of making some provision for his godson, and that he contemplated doing it by means of this policy on his life; but that is a very long way from saying that he thereby constituted himself a trustee of the moneys payable under the policy. I think that the evidence falls short of that which would be necessary to constitute such a trust.

....

In the present case I can see nothing which would have obliged Mr. Sinclair to keep up the policy; had he allowed the policy to lapse, by failing to pay the premium at any time, I can see no possible ground upon which the infant, or any one on behalf of the infant, would have been entitled to sue him for damages or require him to continue to keep up the policy; and indeed, had Mr. Sinclair changed his mind and surrendered the policy and received the surrender value, the money so received would have been his money, and the infant would have had no claim to it. Having regard to those circumstances it seems to me to be impossible to say that there was any such trust as would render the money in the hands of Mr. Sinclair's executors trust money on behalf of the infant."

It is submitted by counsel for plaintiffs that the decision in *Prudential Staff Union* v. *Hall*[4] would support the plaintiffs' contention that a trust has been created in this case. In that case a trade union had taken out a policy of insurance to cover loss by its members. Subsequently when the union made a claim upon the underwriter the underwriter pleaded that the union had no right of action and that the action should have been brought by the member suffering the loss. It was *held* among other things:

"(3) that the union was nevertheless entitled to sue, because the underwriters had contracted in the event of a loss to pay the union, who would thereupon become trustees for the member or members concerned of any amount recovered;"

The facts in that case are however quite different from those in our case and I do not agree with counsel's submission. The legal position of the union in that case which was formed by the members specially to protect their interests and to take out insurance for them is entirely different from that of the defendant company in this case which voluntarily had chosen to insure for its own purposes and had paid for the premium itself.

It is true that the said policy had been taken out by the defendant company upon the lives and disabilities of its employees but that in itself does not give rise to a trust as is shown in *Green* v. *Russel*[5] facts of which are quite similar to those in our case. In that case a group accident policy was taken out by the employer, who was therein described as "the assured," and the protected employees were named in a schedule, with the sums payable on death or disablement in each case. The policy provided that "the (insurance) company shall be entitled to treat the insured as the absolute owner ... and shall not be bound to recognise any equitable or other claim or interest in the policy and the receipt of the insured ... alone shall be an effectual discharge." It was held by the Court of Appeal that an employee on whose death by accident a sum became payable under the policy had no rights at law thereto, because he was not a party to the contract or to the consideration, and no rights in equity because an intention to provide benefits for someone else, and to pay for them, does not in itself give rise to a trust.

As there is no express trust in this case it only remains to consider whether there is a constructive trust. It is submitted by counsel for plaintiffs that from the conduct and practice of the defendant company in relation to the said policy a trust could be construed in this case. I do not agree with this. It is not disputed that 7 other disabled employees had been paid sums due to them calculated on the unit basis after legitimate deductions had been made and that Items 15 and 37 in the Bundle of Documents (A) show that the two plaintiffs might be paid such sums but the defendant company had all along stressed that those payments were made *ex gratia* as is shown, for examples, in Item 1 and Item 37 itself in A. The defendant company was not making provision directly for others but was making one for itself to receive money in the event of death or disablement of its employees and I accept the contention of Mr. Taylor (DW1), the Legal Officer and Secretary of the defendant company, that the "policy was taken to secure the stability of the finance and enable the company to pay a fixed sum annually to the insurance company to meet claims or requests which might be made and also to make voluntary payments in hard cases whether legally liable or not". Condition 6 states that any sum of money payable by the insurance company "shall be payable to the employer or his legal representative whose receipt shall be deemed a final and complete discharge" and that the insurance company "shall not be responsible for the application of such money or for non-application or mis-application thereof". The Deed of Release and Discharge (*e.g.* Item 13 in A) was made between the disabled employee and the defendant company and it is clearly stated therein that the defendant company "without any admission of liability whatever and without prejudice to their rights in the matter has offered to pay to the Releasor an *ex-gratia* payment ... in full satisfaction of all claims of whatsoever nature that he may have against the said company arising out of his recent disability ...". Though the chairman's letter dated 12th March, 1968 states that it is to be understood "that in the unfortunate event of the death of an employee, insured under our Group All Sickness or Group Personal Accident policies, the full amount payable by our Insurers, is in its turn payable in that full amount to the estate of the employee insured" and that there is evidence adduced that the contents of that letter would also be

applicable in respect of disabled employees some deductions had in fact been made from the amounts received from the insurance company and that in no or virtually no case was the money paid to the estate of a deceased employee. In fact the defendant company had paid it to such persons as it considered to be the deceased's dependants which fact itself is incompatible with the defendant company being a trustee. DW1 had satisfactorily explained to the court that he was reluctant to produce the said policy as indicated in Item 30 in A because it might mislead inexperienced practitioners and involve the defendant company in avoidable litigation and that the proposal to amend the said policy was to delete any words which might suggest creation of a trust.

There is nothing to show that the defendant company had received any money from the insurance company in respect of Mr. G. R. Nair's disablement and Item 37 in A shows that only 60% of the total permanent disablement figure calculated on the unit basis amounting to $19,380 had been claimed and received by the defendant company in respect of Encik Mohamed Dom and out of that sum an *ex gratia* payment of $6,769.98 had been made to him after certain deductions as indicated in Item 41 in A had been made. Thus irrespective of the question of trust Mr. G. R. Nair's whole claim and Encik Mohamed Dom's claim insofar as the remaining 40% is concerned would fail as their actions are misconceived. As stated by Lord Wright in *Vandepitte's* case at page 79.

"...The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant."

There are also other grounds on which the defendant company has contended that Mr. Nair's claim would also fail but in view of my findings above it is not necessary for me to deal with them.

In the event I dismiss both plaintiffs' claims with costs.

Claims dismissed.

Solicitors: *Jega & Co.; Mohamed Yaacob, Ibrahim & Gomez; Skrine & Co.*

LEE GUAT ENG v. SEET TIAM HOCK

[O.C.J. (Pawan Ahmad J.) December 13, 1973]
[Malacca — Civil Suit No. 159 of 1971]

Practice and Procedure — Order 14 — Default final judgment — Setting aside — Counter-claim — R.S.C. 1957, O. 64 r. 7 — Stay of execution.

The powers granted by O. 64 r. 7 in the interests of justice permit the setting aside of a final judgement entered under O. 14 where the defendant had defaulted in making payment into court within the time limited by the court under the O. 14 application.

Where there is a counter claim upon the hearing of an O. 14 application even if judgment is given for the plaintiff on his claim, there should be stay of execution pending the trial of the counter-claim or pending further order.

CIVIL SUIT.

R. R. Chelvarajah for applicant/defendant.

S. G. Thakuria for respondent/plaintiff.

Pawan Ahmad J. (delivering oral judgment): Upon the hearing of an application under Order 14 on 8th May 1972 certain orders were made, one of which was that if the defendant did not deposit the sum of $8,000 into court within two weeks, the plaintiff would be at liberty to sign final judgment for the sum of $8,000. The defendant defaulted in making the said payment and the plaintiff on 19th June 1972 entered final judgment against the defendant for the the said sum of $8,000.

By the same order, the defendant was given leave to defend the action as to the residue of the claim and since the defendant has delivered a counter-claim, it follows from this that he would also have liberty to proceed with his counter-claim.

The file indicates that on 14th July 1972 the plaintiff obtained leave to amend his statement of claim and the amended statement of claim was delivered on 20th July 1972.

The present application before the court has been made by the defendant by Summons-in-Chambers dated 24th October 1973. He asks the court to exercise its inherent jurisdiction and make an order:

(i) that the order made on 8th May, 1972 and the final judgment entered on 19th June, 1972 be set aside and that the defendant be given conditional leave to defend the action upon payment into court the sum of $3,000/- within seven days;

(ii) *ALTERNATIVELY*, that the order made on 8th May, 1972 be varied or amended in view of the pending counter-claim of the defendant by adding a further order to the order dated 8th May, 1972 that there shall be stay of execution of the judgment dated 19th June, 1972 until the trial of the counter-claim etc.

In his Affidavit in support of the present application, the defendant admits having defaulted in making payment into court of the sum of $8,000 within the time limited by the order. He had asked the court to consider paragraph 5 of his defence, his counter-claim and the agreement made between the parties on 29 July 1965 and prays that in view of the nature of his defence and counter-claim the court do make an order in terms of his application.

As for the extension of time for the payment into court of the sum of $8,000, it will be necessary to make reference to O.64 r.7 which gives the court the powers to enlarge or abridge the time appointed or fixed by an order "as the justice of the case may require". In exercising my discretion in regard thereto, I have taken into account the averments of the defendant in his affidavit dated 5th December, 1973 where he states that (a) the plaintiff immediately after signing the agreement of sale took possession of the land and is still in possession thereof and (b) that the plaintiff having erected and rented several buildings on some portion of the said land, has been and is still collecting and enjoying rents and profits from such lettings. Further on in the same affidavit, the defendant avers that he could not pay the sum of $8,000 within time "as he did not have any money with him then".